

MAR 08 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORGE MORALES,

Petitioner - Appellant,

v.

FRED BROWN, Warden,

Respondent - Appellee.

No. 04-56712

D.C. No. CV-02-05942-ABC

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Submitted March 6, 2006**
Pasadena, California

Before: GRABER, WARDLAW, and RAWLINSON, Circuit Judges.

Petitioner Jorge Morales appeals from the district court's denial of his petition for habeas corpus. On de novo review, Leavitt v. Arave, 383 F.3d 809, 815 (9th Cir. 2004) (per curiam), cert. denied, 125 S. Ct. 2540 (2005), we affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

The state trial court did not deprive Petitioner of due process by failing to instruct the jury on a theory of "imperfect self-defense," People v. Flannel, 603 P.2d 1, 2 (Cal. 1979), or attempted voluntary manslaughter. The evidence on which Petitioner relies (that rival gang members fired shots at the car in which he was riding) is consistent with the defense theory that Petitioner shot at the rival gang members because he reasonably believed that he was in danger. Accordingly, the jury was instructed on "pure self-defense." By contrast, there was no evidence that, if believed by the jury, would have established that Petitioner honestly but unreasonably feared for his safety. In the absence of evidence to support his theory, the state court did not deprive Petitioner of due process by failing to give the instruction. See Solis v. Garcia, 219 F.3d 922, 928-30 (9th Cir. 2000) (per curiam) (affirming denial of a habeas petition in similar circumstances).

AFFIRMED.